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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 600

AVIS B. VOORHES, WILLIAM G. VOORHES, AND RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, ET AL;
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Judgment Appealed From

Appellants, Avis B. Voorhes, William G. Voorhes, and Rudolph Presutti, appeal from the final judgment of the specially-constituted United States District Court for the District of Connecticut. Appellants submit this Statement to show that the Supereme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the United States District Court for the District of Connecticut which is the subject of this appeal is not yet reported. A copy of the Opinion granting the defendants' Motion for Dismissal of Action is attached hereto as Appendix A.

Jurisdiction

This action was brought by voters in the U. S. District Court for the District of Connecticut under 42 U.S.C. § 1983 and 1988 and 28 U.S.C. § 1343 (3) and (4) to restrain and enjoin the enforcement of certain provisions of the General Statutes of the State of Connecticut which make a party lever mandatory on all voting machines in the said state on the grounds that these statutes impair certain rights of the named plaintiffs and all others similarly situated under the Fourteenth Amendment of the United States Constitution.

A special three judge court was convened to determine the cause pursuant to 28 U.S.C. § 2281 et seq. In due course the defendants filed a Motion to Dismiss which was granted on June 22, 1964 and judgment was entered dismissing the action on June 23, 1964. From this judgment the plaintiffs appealed.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review a judgment on direct appeal from a three judge district court:

> *American Federation of Labor* v. *Watson*, 327 U.S. 582, 592-93 (1946);

and the following reapportionment cases in the October 1963 Term of the Supreme Court of the United States:

Reynolds, Judge, et al. v. *Sims, et al.*, 377 U.S. 533 (1963); *Vann, et al.* v. *Baggett, Sec'y etc.*, 377 U.S. 533 (1963);

McConnell, et al. v. *Frink, Secretary of State of Alabama, et al.*, 374 U.S. 802 (1963) (probable jurisdiction noted);

Davis, Secretary, State Board of Elections, et al. v. *Mann, et al.*, 374 U.S. 803 (1963) (probable jurisdiction noted);

Roman v. *Sincock*, 375 U.S. 877 (1963) (probable jurisdiction noted).

Statutes Involved

Section 9-242 of the Connecticut General Statutes (1958 Rev.) is the statutory provision involved, and this statute is set forth in Appendix B attached hereto.

Questions Presented

The following questions are presented by this appeal:

A. Whether the Constitution of the United States requires the State to provide its citizens a means or method of voting wherein absolute secrecy is preserved.

B. If the answer to the Question A above is "Yes" whether the right to absolute secrecy would be violated by a system of voting whereby a voter may not split his ticket without revealing to those outside the voting booth the fact that he is not voting a straight party ticket.

C. Whether the mandatory party lever established by the Connecticut General Statutes denies the plaintiffs their right to free selection by placing upon them mental and psychological pressure to merely and solely pull a party lever.

D. Whether the mandatory party lever established by § 9-242 of the Connecticut General Statutes subjects independent voters of said state to a more burdensome condition in casting their vote than the conditions to vote required of voters registered in a party.

E. Whether the mandatory party lever established by the Connecticut General Statutes denies Independent voters of said state equal protection of the law.

F. Whether the mandatory party lever is class legislation establishing a preferential group accorded privileges and immunities not granted to other voters.

Statement of Facts

All Connecticut voting machines are equipped with a mandatory party lever. This means that a Connecticut elector cannot vote for any candidate without first pulling a party lever to unlock the machine. If there is a particular candidate on the party slate for whom he does not want to vote, the elector must specifically reject that candidate by pushing up a key assigned to his name. The elector may then vote for another candidate for that particular office by depressing the key assigned to him, or by writing in the name of a candidate not on the ballot. Each party lever (or "straight ticket device," as it is called in the statute) on every voting machine is connected to a common bell so that said bell is caused to ring whenever the party lever is operated. The requirements for both the mandatory party lever and the bell are embodied in § 9-242 of the Connecticut General Statutes, Revision of 1958, Revised to 1964, which is set out in Appendix B of the Jurisdictional Statement.

Appellants, who are three Connecticut voters, brought this action on behalf of themselves and others similarly situated under 42 U.S.C. § 1983 and 1988, and 28 U.S.C. § 1343, to

enjoin the operation of Connecticut voting machines equipped with a mandatory party lever and to have § 9-242 of the Connecticut General Statutes declared unconstitutional. Plaintiffs named as defendants the Governor and the Secretary of the State, both of whom are election officials of the State of Connecticut. The complaint alleged that the mandatory party lever system employed by Connecticut violates the Fourteenth Amendment to the United States Constitution because it:

(1) denies the plaintiffs their right to a secret ballot, for those outside the booths can tell whether an elector has voted for a split ticket by listening for the clicking of the individual keys and noting the longer time required to vote;

(2) subjects independent voters to more burdensome conditions than party voters;

(3) denies the plaintiffs their right to a free selection through mental and psychological pressure to restrict their voting efforts to pulling a party lever.

In due course the defendants filed a Motion to Dismiss for failure to state a claim upon which relief can be granted, which was granted on June 22, 1964; judgment was entered dismissing the action on June 23, 1964. The Memorandum and Order filed by the District Court, and the Judgment entered by it, are set out in Appendix A attached hereto. In brief, the Court adjudged that no claim was made upon which relief could be granted on the grounds that:

(1) There was no allegation that the broad discretion vested by the Federal Constitution in the states to formulate election systems had been abused.

(2) The use of the mandatory party lever, while operating as a discrimination against the independent voter, is not such an unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

(3) Even if the Federal Constitution requires a secret ballot, such a requirement does not extend to the possibility that others might discover a lack of party fealty on the part of a voter, because he has split his vote.

The Questions are Substantial

There are 1,279,029 registered voters in Connecticut; of these 469,185 classify themselves as "independent." These unaffiliated voters should not be forced to act as party members when casting their votes – not even momentarily. It is contrary to our basic principles to be forced to vote and then to "unvote," in order to choose our candidates for public office. Some measure of the burden imposed by the mandatory party lever system may be found in the fact that since 1945 bills to abolish the party lever have been introduced at every legislative session in Connecticut.

The Judgment of the specially-constituted District Court, however, says in essence that the alleged burdens placed upon voters by the mandatory party lever are so insubstantial as not to require plenary consideration. The plaintiffs respectfully disagree with this conclusion and affirm that there is a constitutional right to absolute secrecy of the ballot and absolute equality in the method and technique of casting a ballot. It has been held that a state statute which prevented a candidate's name from ever appearing at the head of the lists on voting machines was unconstitutional because it deprived the candidate of a right protected by the privileges and immunities clause of the Constitution. *Kautenburger* v. *Jackson*, 85 Ariz. 128; 333 P.2d 293, 295 (1958). There the Arizona Supreme Court said:

> "It has been recognized, we think correctly, that it is a commonly known and accepted fact that where there are a number of candidates for the same office, the

> names appearing at the head of the list have a distinct advantage."

That reasoning applies with at least equal force to those candidates from the two major parties whose names appear on Connecticut voting machines. Conversely, it follows that much of the unfair advantage thus attained is a result of the burden under which the independent voter must cast his vote. Thus, the state-sanctioned burden denies the independent voter the equal protection of the laws guaranteed him by the Fourteenth Amendment. *Anderson* v. *Martin*, 375 U.S. 399, 112 L.Ed. 430, 84 S.Ct. 454; 32 Law Week 4101 (1963).

The District Court, in its Memorandum of Decision, assumed without deciding that the Federal Constitution or statutes require a secret ballot. *Thus the important questions of whether there is a federally-protected right to a secret ballot, and — if it does exist — the extent of its scope, are presented by this appeal,* which questions affect each voter, not only of Connecticut, but of the United States.

In *Johnson* v. *Clark*, 25 F. Supp. 285 (N.D. Tex. 1938), the court was concerned with the meaning of "ballot" as it is used in Title 2, U.S.C.A. § 9, in providing that the manner of voting "shall be by written or printed ballot, or by machine." The court said at page 286:

> "The word 'ballot' in an election provision means a method which will insure, so far as is possible, the secrecy and integrity of the popular vote."

Smith v. *Blackwell*, 115 F. 2d 186 (4 Cir. 1940), however, seemed to deny the existence of a constitutional right to secrecy, and held that there was no "case or controversy" when certain electors tried to maintain a declaratory judgment action against the Secretary of State of South Carolina, where

he was not specifically charged with any duty by the South Carolina statutes to preserve secrecy of the ballot.

With deference to the Court of Appeals for the 4th Circuit, we feel that the court in *Johnson* reached the correct conclusion. A ballot originally consisted of a ball, bean, a grain of corn, or other small article which could be concealed in the hand so that others might not know how the voter cast his ballot. It implies secrecy in the matter of voting, and any act by which an elector, in secrecy, casts his vote for or against a candidate or an issue constitutes a ballot. See *Norris* v. *Mayor & City Council*, 172 Md. 667, 192 A. 531 (1937); *State* v. *Green*, 121 Ohio St. 301, 168 N.E. 131 (1929), 66 ALR 849. See also *State* v. *Keating*, 53 Mont. 371, 163 P. 1156 (1917).

I. The Use of Mandatory Party Levers Denies the Independent Voter Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment.

The basic feature of the party lever is by definition that it improperly discriminates against small political parties and the independent voter by forcing said independent voter to vote for a major party as a condition precedent to voting. The independent voter is the one class of voter, as opposed to electors enrolled in a political party, who must first pull a lever of a party in which he is not enrolled before he can vote. This is discriminatory and places psychological coercive pressure upon him to vote for either party slate instead of splitting his ballot. In a case involving a paper ballot the question was raised whether paper ballots which had printed blocks for the major parties were proper. Under the statute under consideration in that case a voter could check a block and vote for a party slate or check individual blocks for each office. In that case the California Supreme Court in *Eaton* v. *Brown*, *infra* held that the use of such party blocks on the ballot was unconstitutional and void because "it is an attempt to discrimi-

nate against classes of voters and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial disenfranchisement, or to the casting of their votes upon more burdensome conditions than others no better entitled under the fundamental law to the free and untrammeled exercise of the right of suffrage." The Court went on to state that such party labels were unconstitutional because,

> "it would be of no benefit to any party to allow it a ticket heading unless it had a full state and local ticket, for no voter of the party could express his choice by stamping the party designation without partial or total disenfranchisement . . . upon these grounds we hold that this provision destroys the just and equal and uniform operation which is an election law, of all others, is demanded, no less by the express terms of our fundamental law than by the genius and spirit of our institutions . . . There should be no party designation printed at the head of the tickets because there can be no voting by stamping such designation."
>
> *Eaton* v. *Brown*, Calif. 1892; 31 P. 250.

This is the precise issue presented by this case and its reasoning is persuasive for the appellants' contention that a party lever discriminates against independent voters and small parties, and subjects all such voters to an unequal burden in the casting of their ballot; and thus denies them equal protection of the laws as well as the right to a free selection.

II. The Party Lever, Whether Mandatory or Optional, Violates the Rights of All Voters to a Secret Ballot and Also Thus Denies Their Right to a Free Election.

Without absolute secrecy being insured, men would feel constrained to vote in certain ways out of fear of reprisal, and not by exercise of free choice. Therefore if we assume – as did the District Court in granting defendants' Motion to Dis-

miss – that there is a discernible sound which is emitted when a voter splits his ticket using the mandatory party lever, the question now is whether the right to a secret ballot is violated by such a system. That is, assuming there is a right to a secret ballot, does the right include a requirement that no one be able to ascertain whether a voter has split his ticket?

In *Helme* v. *Board of Election Com'rs*, 149 Mich. 390, 113 N.W. 6 (1907), the Michigan Supreme Court invalidated the use of an election machine which could not handle all the issues and candidates, so that a voter had to ask for a paper ballot to vote in a split ticket. The statute providing for the machine was held unconstitutional because it failed to afford secrecy of the vote. The court said:

> "It is obvious that a voter cannot ask for and vote such a ballot without indicating that he does not vote for his full party ticket, and, to the degree that he is reluctant to have his want of party fealty known, it acts as a deterrent to his voting for the persons of his choice, and operates against his independence as a voter."

Similarly, if a Connecticut party-member cannot split his ticket without indicating to those outside the voting booth (required by law to be members of the major parties) that he has done so, the element of coercion must be felt, in denial of his right of free choice.

The District Court's opinion discounts the effect of the ascertainability of ticket-splitting by saying that no one can tell which candidates or party a voter has chosen. This argument defines secret ballot too narrowly. If the necessity for a secret ballot is to be found in the importance of insuring that every man follow his conscience when voting, then a broader scope must be given to secrecy. It must include the inability on the part of anyone to determine who is a ticket-splitter.

Conclusion

The questions involved in this appeal are substantial and ought to be resolved by this Court. The unfettered right of suffrage, essential to a democratic society, is being denied to 1,279,029 Connecticut voters by the mandatory party lever system. Whether it is to continue is of such fundamental importance that it ought now to be determined by this Court.

Respectfully submitted,

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APPENDIX A

United States District Court
District of Connecticut

AVIS B. VOORHES, ET AL, *Plaintiffs* v. JOHN DEMPSEY, Governor of the State of Connecticut, and ELLA T. GRASSO, Secretary of the State of Connecticut, *Defendants*	Civil Action No. 10,462

MEMORANDUM OF DECISION
ON
MOTION TO DISMISS

Three Connecticut voters, on behalf of themselves and others similarly situated, bring this action under the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343, to enjoin the operation of Connecticut voting machines equipped with a mandatory party lever and to have Section 9-242 of the Connecticut General Statutes (1958 Rev.), which requires that the machines be so equipped, declared unconstitutional. The defendants, the Governor and Secretary of the State of Connecticut, have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. We find the complaint fatally deficient and grant the motion to dismiss.

Section 9-242 of the Connecticut General Statutes provides that all voting machines in Connecticut shall be equipped with

party levers but "shall permit an elector to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and shall permit voting in absolute secrecy." Any Connecticut elector is free to vote or not to vote for any candidate; however, since a party lever must be pulled to unlock the machine, the elector must specifically reject any candidate on the party slate for whom he does not wish to vote by pushing up a key assigned to that candidate's name. The elector may then vote for another candidate for that particular office by pushing down the key assigned to the candidate of his choice or by writing in the name of a candidate not on the ballot.

The complaint alleges that the mandatory party lever system employed by Connecticut violates the Fourteenth Amendment to the United States Constitution because it:

(1) denies the plaintiffs their right to a free selection through mental and psychological pressure to restrict their voting efforts to pulling a party lever;

(2) subjects independent voters to more burdensome conditions than party voters;

(3) denies the plaintiffs their right to a secret ballot, for those outside the booths can tell whether an elector has voted for a split ticket by listening for the clicking of the individual keys and noting the longer time required to vote.

The allegations of the complaint plainly fail to state any claim upon which this court may grant relief. Under the Federal Constitution the states have been entrusted with broad discretion in formulating an election system. *United States* v. *Classic*, 313 U.S. 299, 311 (1941), and nothing in the complaint indicates that this discretion has been abused. The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting

for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be termed fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to split ticket voters from the Connecticut statute would appear to be much less than the New Jersey statutes, sustained by a three judge court in *Voltaggio* v. *Caputo*, 210 F.Supp. 337 (D.C.N.J.), app'l dismissed, 371 U.S. 232 (1962), denying an independent candidate the opportunity to have his name listed on the ballot with the top group of candidates. Cf. *McDougal* v. *Green*, 335 U.S. 281 (1948).

The utilization of party levers, be they optional or mandatory discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of voters. It is for the legislature to determine the wisdom of making such a discrimination for this purpose. We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

Assuming, but without deciding, that the Federal Constitution or statutes require a secret ballot,[1] the party lever does not deprive voters of a secret ballot. No one outside the booth can tell for which candidates or party a ballot has been cast,

[1] Compare *Johnson* v. *Clark*, 25 F.Supp. 285 (N.D. Tex. 1938) with *Smith* v. *Blackwell*, 115 F.2d 186 (4 Cir. 1940).

or indeed, whether an elector has voted for any candidates at all. Plaintiffs' claim of an unsecret ballot amounts actually only to the possibility that a voter may be subjected to an accusation of a lack of party fealty for having split his vote, a far cry from an unsecret ballot. Even this accusation may be wholly false, for a voter may finally vote a straight ticket after rejecting certain candidates by pushing their individual keys back up. For all practical intents and purposes, the Connecticut procedure is a secret ballot.

Nor is there any federal statute upon which relief may be granted. The only federal statute relating to the mechanics of voting (other than absentee ballots) which has come to our attention is 2 U.S.C. § 9, which simply provides: "All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect." Obviously nothing in this statute can be construed to prohibit a state from authorizing the use of a voting machine equipped with a mandatory party lever. Cf. *Smith* v. *Blackwell*, 115 F.2d 186, 189 (4 Cir. 1940).

The motion to dismiss the complaint is granted.

J. Joseph Smith,
United States Circuit Judge

Robert P. Anderson,
United States District Judge

M. Joseph Blumenfeld,
United States District Judge

June 22, 1964.

APPENDIX B

Statute 9-242

"§ 9-242. Construction requirements

A voting machine approved by the secretary of the state shall be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations. It shall be provided with a single straight ticket device for each of such parties, by the use of which an elector may vote for all the candidates of that party, and shall permit an elector to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and shall permit voting in absolute secrecy. Any such machine shall have a bell which shall be so connected to the straight ticket device for each party as to ring whenever any straight ticket device is operated; each straight ticket device on such machine shall be so connected to the same bell. Such machine shall be so constructed that an elector cannot vote for a candidate or on a proposition for whom or on which he is not lawfully entitled to vote. It shall be so constructed as to prevent an elector from voting for more than one person for the same office, except when he is lawfully entitled to vote for more than one person for that office, and it shall afford him an opporunity to vote for only as many persons for that office as he is by law entitled to vote for, at the same time preventing his voting for the same person twice. It shall be so constructed that all votes cast will be registered or recorded by the machine, and shall be provided with a lock by means of which any illegal movement of the voting or registering mechanism is absolutely prevented. It shall be capable of adjustment for use at primaries so as to permit voting for indi-

vidual candidates without first operating a straight ticket device. Any such machine which has a curtain lever which is not visible to the election officials while the machine is being operated shall have a bell so attached to the curtain lever as to ring when the curtain lever is closed. (1949 Rev., § 1191; 1953, Supp. § 719d; 1957, P.A. 561, § 4.)"

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JOHN DEMPSEY, GOVERNOR OF THE STATE OF CONNECTICUT, and ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

For Appellees:

HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

MOTION TO AFFIRM

The appellees in this case move to affirm the judgment of the United States District Court for the District of Connecticut on the ground that it is manifest that the questions on which the decision depends are so unsubstantial as not to need further argument.

Dated November 16, 1964.

Respectfully submitted,

Appellees

By: HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES RE MOTION TO AFFIRM

For Appellees:

HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
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JURISDICTION

Although the present action is brought under the Civil Rights Acts 42 U.S.C., Sections 1983 and 1988, and 28 U.S.C., Section 1343, the appellees claim that the judgment dismissing the action should be affirmed since the complaint is fatally deficient in that it fails to state a cause of action showing the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States and it fails to allege any federal statute upon which relief may be granted.

The only federal statute cited by the plaintiffs in the Jurisdictional Statement is Title 2 U.S.C., Section 9, which was considered by the United States District Court and found that the statute did not prohibit a state from authorizing the use of a voting machine equipped with the mandatory party lever. See Opinion of the United States District Court for the District of Connecticut at page 16 of Jurisdictional Statement.

STATEMENT OF THE CASE

The voting machines used in the State of Connecticut are constructed in accordance with the provisions of Section 9-242 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, and as set forth on page 17, Appendix B, of the Jurisdictional Statement. Since first used in Connecticut all voting machines in general elections have been provided with the mandatory party lever. Each machine must be equipped with at least seven different party levers and each political party nominating candidates for any office at any election is entitled to a party lever. In addition, individuals who desire to run for public office at any election are entitled to a party lever provided they qualify by filing a petition with the Secretary of the State signed by a number of qualified electors equal to one-half of 1% of the votes cast for the same office or offices at the last preceding election (Section 9-453,

General Statutes of Connecticut, Rev. of 1958, Revised to 1964). Candidates qualifying by petition have a straight ticket lever marked "Independent" unless they are nominated by a qualified political party.

As the lower Court stated, "The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate." Jurisdictional Statement, Appendix A, Page 14.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

Neither the United States Constitution nor any Federal statute specifically requires a secret ballot. The Federal cases have construed the word "ballot" as used in 2 U.S.C., Sec. 9, as meaning "a method which will insure, so far as is possible, the secrecy and integrity of the popular vote." *Johnson v. Clark*, 25 Fed. Supp. 285 (1938). In that case each voter as he appeared before the election officials was given a number next in order to the number given to the previous voter. The voter after marking his ballot would then return it to an election official who before placing the ballot in the ballot box would mark it with the same number the voter had received on entering the polling place. The Court held that such procedures constituted a secret ballot and there was no presumption of disclosures by election officials. Furthermore, it was pointed out that the United States Constitution, Article I, Section 4, leaves the "manner" of holding elections to the States, until and unless the Congress provides otherwise.

Smith v. Blackwell, 115 F. 2d 186 (1940), concerned a situation where the custom and practice had been for any political party, having candidates, to print and provide its own ballots, which showed only the names of the candidates of that party and the respective offices for which such candidates were nominated. The plaintiffs in the action sought a declaratory judgment to the effect that the South Carolina

election law as administered violated the Federal law in that the secrecy of the ballot was not adequately preserved. The Court after quoting 2 U.S.C., Sec. 9, stated:

> "There is manifestly nothing in this (2 U.S.C., Sec. 9) which authorizes the Courts either to set up election machinery by order or to declare that the blanket or Australian form of ballot must be used or that other election practices must be followed."

The Johnson and Smith cases were cited by the lower Court only to show certain factual situations which have been held not to be in violation of what constitutes a "secret ballot".

In Connecticut the voting machine is constructed in accordance with Section 9-242, General Statutes of Connecticut, Rev. of 1958, Revised to 1964, (Appendix B — Jurisdictional Statement), and requires "voting in absolute secrecy". The pertinent portions of other Connecticut statutes regulating the voting process are quoted in the Appendix. No person in or about the voting machine can see or ascertain how any voter has voted. All party levers for all political parties nominating candidates are connected to a common bell, and there can be no distinguishing sound for any particular lever. Once a party lever is pulled, the pointers for the various candidates of any party may be manipulated by a voter at will. There is no discrimination as to any voter and each must follow the same procedures when voting.

We submit, as found by the lower Court, that the party lever does not deprive voters of a secret ballot. No one outside the actual voting booth can tell which party lever has been used by the voter or which candidate or candidates the voter has selected, or even that the voter has actually voted.

THE JURISDICTIONAL STATEMENT

The appellants in their Jurisdictional Statement (p. 7) have not cited any statute or any Court decision which sustains their position. The case of *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, involved a statute which was held invalid because it was designed to ultimately promote racial discrimination insofar as candidates for office were concerned. The Court in part stated:

> "At the outset it is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race."

On page 8 of the Statement the appellants state:

> "The basic feature of the party lever is by definition that it improperly discriminates against small political parties and the independent voter by forcing said independent voter to vote for a major party as a condition precedent to voting."

The party lever as used in Connecticut does not discriminate in any way against "small political parties". Each political party nominating a candidate or candidates is entitled to a party lever, irrespective of whether it is a major or minor party. All party levers are operated in the same manner. The appellants have not defined how or in what manner the party lever discriminates against "small political parties", nor have they cited any authority to substantiate their position.

The case of Eaton v. Brown Calif. 1892; 31 P. 250, is irrelevant since that case considered positions of candidates' names on primary ballots only.

Section 9-372 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, defines "primary" as meaning "a meeting of the enrolled members of a political party held during consecutive hours at which such members may, without assembling at the same hour, vote by secret ballot for candidates for nomination to office or for town committee members or delegates to conventions".

Thus, a primary does not involve party levers since participation therein is limited only to enrolled members of a particular political party.

In Section II, p. 9, the appellants' only claim, that the secrecy of the ballot is denied, is based upon the assumption that election officials in the polling place *might* be able to ascertain whether a person has voted a "split-ticket" because of a "discernible sound" in moving the pointers while selecting individual candidates.

The sound, if any, in moving pointers on a voting machine is the same for all pointers, including the pointers for the various questions listed on the machines, for which each voter is entitled to make a free choice.

Section 9-262 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, provides in part "No election official shall remain or permit any person to remain in any position or near any position that would permit him *to see or ascertain how an elector votes or how he has voted.*" (Italics ours).

The argument of the appellants is based upon the pure presumption that election officials do not properly carry out their statutory duties. Their claim is without factual substantiation. We also point out that the Connecticut statutes provide severe penalties for persons violating any of the statutes regulating the prescribed manner of conducting any election.

CONCLUSION

As previously indicated under the United States Constitution, the States are empowered to regulate the manner of conducting elections until and unless the Congress provides otherwise. We submit that a voting machine which assures every elector (1) a right to cast his vote with equal facility to that offered to every other voter, (2) secrecy in the act of voting on the part of the voter, (3) free choice of candidates, (4) a correct record of the vote, and (5) a correct record and announcement of the total vote given for each candidate, meets all constitutional requirements. Connecticut voting machines meet all of these tests. As the lower Court said "The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket."

The so-called party lever is a mechanical device and it is, basically, a matter of opinion as to whether or not it facilitates the voting process. No matter how a voting machine is constructed, there will always be some with the opinion that certain changes should be made. However, differences in opinion or judgment should never be a ground for interfer-

ence by the Courts. *Comley, State's Attorney ex rel. Harrison v. Wilson*, 116 Conn. 36, 43; *Wadsworth v. Middletown*, 94 Conn. 435.

Respectfully submitted,

Appellees

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APPENDIX

PERTINENT PORTIONS OF GENERAL STATUTES OF CONNECTICUT RELATING TO METHODS OF VOTING (TITLE 9, GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958, REVISED TO 1964).

Section 9-240. Provision of voting machines and booths.

". . . The interior of the booths shall be secure from outside observation. . . ."

Section 9-242. Construction requirements.

See Jurisdictional Statement, Appendix B, Page 17.

Section 9-257. Location of machine and stationing of officials.

"The room in which the election is held shall have a railing separating the part of the room to be occupied by the election officials and the machine from the part of the room adjacent to the entrance thereof. A guard rail may be provided separating the machine from the election officials and the machine shall be placed, if possible, at least three feet from any wall or partition or guard rail of the polling place and at least four feet from the checkers' table. The exterior of the voting machine and every part of the polling place shall be in plain view of the election officials. The machine shall be so placed that no person outside the voting machine booth from any part of the room or from any place outside the room can see or determine how the elector casts his vote and shall be so placed, as far as possible, as to be in view of the officials and the electors within the polling place from the beginning of the election. The election officials shall be so stationed that no member thereof shall be concealed by the machine from the electors within the polling place. The

moderator or some one designated by him shall be stationed near the machine, shall regulate the admission of the electors thereto and shall always be in full view of the other election officials and the electors within the polling place."

Section 9-261. Process of voting.

"When an elector has entered the polling place, he shall announce his street address, if any, and his name to the checkers in a tone sufficiently loud and clear as to enable all the election officials present to hear the same, and each of the checkers shall check the name of such elector on the official registry list. If not challenged by any of the election officials, the elector shall be permitted to pass the railing to the side where the machine is located and into the voting machine booth, and he shall then register his vote in secret. Having voted, he shall immediately pass out and leave the room. . . ."

Section 9-262. Duties of election officials during voting hours.

". . . After the opening of the polls, no election official shall allow any person other than the election officials to pass within the railing to the part of the room where the machine is situated, except for the purpose of voting or except as provided in this part; and no such official shall permit more than one elector at a time to be in such part of the room. No election official shall remain or permit any person to remain in any position or near any position that would permit him to see or ascertain how an elector votes or how he has voted."

Section 9-355. Official neglect or fraud.

"Any person who, without reasonable cause, neglects

to perform any of the duties required of him by the laws relating to elections and for which neglect no other punishment is provided, and any person who is guilty of fraud in the performance of any such duty, and any person who makes any unlawful alteration in any list required by law, shall be fined not more than three hundred dollars or be imprisoned not more than one year or be both fined and imprisoned. Any official who is convicted of fraud in the performance of any duty imposed upon him by any law relating to the registration or admission of electors or to the conduct of any election shall be disfranchised. Any public officer or any election official upon whom any duty is imposed by part I of chapter 147 and sections 9-308 to 9-311, inclusive, who wilfully omits or neglects to perform any such duty or does any act prohibited therein for which punishment is not otherwise provided shall be fined not more than two thousand dollars or imprisoned not more than three years or both."

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 600

AVIS B. VOORHES; WILLIAM G. VOORHES AND RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, GOVERNOR OF THE STATE OF CONNECTICUT, and ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO AFFIRM

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In the

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AVIS B. VOORHIES, WILLIAM G. VOORHIES
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v.

JOHN DEMPSEY, GOVERNOR OF THE
STATE OF CONNECTICUT, and ELLA T. GRASSO,
SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO AFFIRM

I. The Use of the Mandatory Party Lever Presents Substantial Constitutional Questions.

The issue before this court at this juncture is not whether the mandatory party lever in fact violates certain constitutional rights but whether the effect of the mandatory party lever on the asserted constitutional rights presents a substantial

federal question so that this court ought to take jurisdiction of the case. *Florida v. Lime and Avacado Growers v. Jacobsen*, 362, U.S. 73, 80 S.Ct. 568 (1960); *U.S. v. Georgia Public Service Comm.*, 371 U.S. 285, 83 S.Ct. 307 (1963).

The appellants maintain that the United States Constitution guarantees to every voter a right to a ballot that is cast under absolutely secret, unbiased and non-discriminatory conditions; and that the existence of these rights and the effect thereon by the mandatory party lever presents substantial constitutional questions.

The appellants believe these constitutional issues are questions of first impression to this court as they have been unable to find any United States Supreme Court case directly discussing such rights. Nevertheless, the substantiality of the issues raised by this appeal is manifest from the facts alleged in the complaint (admitted for the purposes of this appeal), and from the statements of this court in related areas, lower federal court decisions, and state statutory and decisional law.

This court has taken jurisdiction of and decided cases claiming constitutional violations of the right to vote. *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *Wiley v. Sinkler*, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84; *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005; and the right to have one's vote counted equally, *U.S. v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801. The appellants now ask this court to assume jurisdiction of this case which asserts an indispensable, ancillary right, the right to vote under secret and non-discriminatory conditions, so that the act of casting a ballot is free from influence and pressures of any kind. The alternative is a partial disfranchisement tending to dilute the effect of every voter's ballot.

A. THE MANDATORY PARTY LEVER VIOLATES THE RIGHT TO A SECRET BALLOT.

The appellants submit that the due process and equal protection clauses of the 14th Amendment to the United States Constitution require for all elections a secret ballot, not by force of their express words, but by their necessary implication. *U.S. v. Classic*, 313 U.S. 299, 310, 314-15, 61 S.Ct. 1031, 85 L. Ed. 1368 (1940). A secret and equal ballot is also necessarily implied by Article I, Section 2, and the 17th Amendment of the United States Constitution which provides that Representatives and Senators shall be chosen and elected by the people. *United States v. Classic*, supra. While the "manner" of holding elections is left to the states until Congress provides otherwise, Article 1, Section 4, U.S. Constitution, the state cannot thereby circumscribe these constitutional rights. Therefore, the question of what rights are so fundamental to a free choice of the people, as to be constitutionally implied, is to be resolved by the federal courts.

The right to cast a ballot is a constitutional right. *U.S. v. Classic, supra.* The only federal case discussing the right to a secret ballot is *Johnson v. Clark*, 25 F.Supp. 285 (N.D. Tex. 1938). The pertinent passage of the opinion, incorrectly and only partly quoted by the appellees, stated that:[1]

> "Furthermore, the National Constitution, Art. 1, Sec. 4, U.S.C.A. Const. art. 1, § 4, leaves the matter to the states, until and unless the Congress provides otherwise. The Congress did provide in this particular matter, Title 2, U.S.C.A. § 9, that so far as the manner is concerned, that it shall be by written or printed ballot, or by machine. This, I think, means secret ballot."
>
> "The word 'ballot' in an election provision, means a method which will insure, so far as possible, the secrecy and integrity of the popular vote."

[1] Motion to Dismiss, P. 6.

The case of *Smith v. Blackwell*, 115 F.2d 186 (4th Cir. 1940) cited by appellees and the District Court[2] which might be considered to deny a right to secrecy of the ballot, is upon analysis irrelevant on that point. That court found no justiciable controversy because the complaint did not involve the constitutionality of a state election law. Here, the appellants directly attack a Connecticut election statute as violating the right to secrecy.

Even if the *Smith* case could be considered as denying the right to secrecy, then this court would be presented with a conflict of the only two federal cases dealing with a federal right to secrecy of the ballot, clearly a substantial federal question.

The appellants contend that the generally accepted usage of the word "ballot" is now, and was at the time of the Constitutional Convention, a method of voting in secret. *State v. Keating*, 53 Mont. 371, 163 Pac. 1156[3], and further, that the right to cast a ballot, by necessary implication, includes the right to cast it in secrecy. In *Mooney v. Phillips*, 173 Tenn. 398, 118 S.W.2d 224, 226 the court stated:

> "... the prime object of constitutional provisions that voting shall be by ballot is to insure secrecy to the voter in expressing his choice as between candidates."

Every court presented with the issue of secrecy of the ballot found the right to exist at the state level.[4] These cases, while arising under various facts, all indicate that courts consider the existence of the right a substantial question worthy

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[2] Jurisdictional Statement, Appendix A, P. 15; Motion to Dismiss, P. 6.

[3] See also Websters 3d International Dictionary, CJS Elections, Sec. 201(b), 203.

[4] Representative cases: *Felt v. Edwards*, 181 Ky. 287, 204 S.W. 145 *Clark v. Quick*, 377 Ill 424, 36 N.E.2d, 563; *State v. Keating*, 53 Mont. 371, 163 Pac.1156.

not only of consideration but protection. State statutes expressly providing such a right also show the concern of lawmakers with the secrecy of the ballot.[5]

The District Court assumed, without deciding, that a right to secrecy existed but held that the party lever did not violate that right since such right extends only to the name of the candidate or party voted for and not to whether the voter split his ticket or voted a straight ticket. It concluded by saying that "For all practical intents and purposes, the Connecticut procedure is a secret ballot",[6] i.e., that no substantial question was presented by the party lever. The appellants submit that the District Court overlooked the practical aspects of the matter and also the considerations expressed by this court in *Ex Parte Yarbrough, supra*, that "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so . . . in a republican government, like ours, . . . the temptations to control these elections by violence and corruption is a constant source of danger."

The District Court acknowledged that revelation of a split ticket might subject a voter to an accusation of lack of party fealty but found this, summarily, a "far cry from an unsecret ballot."[7] While in *Yarbrough, supra*, the high court examined the temptations to control elections in the factual setting of violence and corrupt practices, the appellants maintain that the court addressed itself with equal force, to all forms of control, including that which could readily be exercised by party officials over party members by sanctions imposed upon

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[5] E.G. Conn. Gen. Stats. § 9-242, cited in appellants jurisdictional statement, App. B, P. 17, and § 9-240, cited in Motion to Dismiss, App. 1a.

[6] Jurisdictional Statement, Appendix A, P. 16.

[7] Jurisdictional Statement, Appendix A, P. 16.

revelations of breach of party fealty. The Connecticut Supreme Court of Errors itself recognized the practical and political dangers of an unsecret ballot in *Mansfield v. Scully*, 129 Conn. 494, 501, 29 A.2d 444 (1942) where in discussing a statute concerning distinguishing marks on ballots, the court stated:

> ". . . it is designed to prevent a voter from giving information to some interested persons as to the way in which he voted, a result which might easily come about and be put to political use if the ballot could be marked, by reason of the fact that all ballots are subjected to the scrutiny of the counters, whose appointments are of a political nature . . ."

The appellants maintain further that even if the voter is, by happenstance in such circumstances that political accusations and sanctions will not influence his vote, he nevertheless has an absolute right to secrecy in the manner in which he voted, i.e., whether he split his ticket, and that no one has a right to know that fact. It is impossible to foresee what other uses can be made of information concerning the way a person voted, but the mind of man can be devious and no one should be exposed to potential opprobrium or improper influence by the disclosure of any aspect of his vote.

The appellants submit, therefore, that there is a constitutional right to a secret ballot and that a substantial question is raised whether this right is violated by Connecticut's mandatory party lever statute.

B. The Mandatory Party Lever Creates Unequal and Discriminatory Voting Rights.

The appellants also submit that under the equal protection clause of the 14th Amendment, every voter has a constitutional right to vote under conditions free from influence, bias or

pressure and that the mandatory party lever violates that right. Federal and state cases support this claim in that they recognize the right of a voter to cast his ballot under conditions free from discriminatory or confusing election devices and procedures. These judges, many of them eminent jurists, concerned themselves with this question, and their opinions are ample proof that the question presented here is a substantial one.

In *Ex Parte Yarbrough, supra,* the Supreme Court condemned "temptations to control" free elections. Accordingly, the appellants maintain that any election device or procedure that tends to influence or exert mental or psychological pressure on a voter to cast his ballot in a particular manner presents a temptation to control elections within this proscription. By addressing itself to the problem of protecting voters from control and influence, this court recognized the question as a substantial one.

As stated by Justice Douglas in *Gray v. Sanders,* 372 U.S. 368, 379-80, 83 S.Ct. 801 (1963) "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." While this case is irrelevant on its facts, it underlines the fundamental constitutional requirement that no discrimination can be allowed in the election process.

The appellants submit that a vote is not equal unless cast under circumstances which equally affect every qualified voter's ability to cast his ballot, whether enrolled in a political party, or independent. The mandatory party lever subjects an independent voter to burdensome and confusing conditions surrounding the act of casting his ballot. Unlike the voter enrolled in a major political party, the independent voter must first pull the party lever, perhaps against his will, then "unvote"

before he can vote at all. This requirement tends to apply a particular pressure on the independent elector to vote a straight party slate rather than a split ticket, and to an additional risk that an improper maneuver may result in a total loss of his vote or register in a manner other than intended.

The District Court admitted the appellants claim that the mandatory party lever discriminates against the independent voter, but it denied relief on the basis that the discrimination was not unreasonable. The appellants respectfully submit that the District Court failed to correctly assess the inequality imposed upon the voters by the mandatory party lever statutes.

The New York Court of Appeals has consistently held that

> "There must be no unnecessary discrimination between the independent and the party voter in respect to the facilities offered to him for a prompt and intelligent and ready expression of his choice." *Aurelio* v. *Cohen*, 291 N.Y. 176, 51 N.E. 2d 695, 697 (1943). *Matter of Crane* v. *Voorhes*, 257 N.Y. 298, 304, 178 N.E. 169; *Callaghan* v. *Voorhis*, 252 N.Y. 14, 168 N.E. 447, 448 (1929).

In the *Crane* case, a court composed of Justices Crane, Cardozo, Pound and Kellogg stated that:

> "In the short space of time usually taken for pulling the lever of the machine, he might not notice or have his attention called to the fact that Crane's name appeared as the candidate of that body, not upon the line where it naturally belonged, but two lines above, as the candidate of another body.
>
> The Election Law is aimed to afford facility for ready voting as well as to guard against illegal and dishonest practices. All voters within reasonable regulation must have the same opportunity or else they are disenfranchised within the spirit and meaning of the Constitution . . . Regulations and restrictions there must be, but these must apply to all alike, and not

> create conditions which make it easy for one but difficult and confusing for another." 178 N.E. at 170-71.

In *Callaghan v. Voorhis*, 252 N.Y. 14, 168 N.E. 447, 448 (1929) the same court stated:

> "Many inequalities, of course, exist by nature and perhaps by education in the electorate, but before the law, all, so far as possible, must be considered equal. The clever man has no difficulty in knowing just what to do. The law, however, recognizes that many voters unfamiliar with the machinery of politics become perplexed and confused with the size of the ballot and the number of officers to be voted for in our modern elections. Regulations and restrictions are necessary, as we have found from experience, to insure honest elections; but they become unconstitutional when they unnecessarily and unfairly restrict or prejudice one class of voters and not others."

The pressures generated by the mandatory party lever to vote a straight party ticket are increased by the Connecticut statute that requires every voter to cast his vote in a voting machine in one minute. Section 9-261, Conn. Gen. Stats., Rev. 1958, as amended. Not only must an independent voter figure out how to split his ticket, but he also must do it under the pressure of a 60 second time limit. The Illinois Supreme Court found that splitting a ballot under such a time limit presented a substantial constitutional question. *People ex rel. v. Taylor*, 257 Ill. 192, 100 N.E. 534 (1913).

The Pennsylvania Supreme Court also found substantial the argument that each voter has "a right of suffrage subject to no undue hindrance or burden not imposed on every other voter", and that the election practices reviewed produced inconvenience and confusion which practically disenfranchised many voters, in this instance party voters. *Davidowitz v. Philadelphia County*, 324 Pa. 17, 187 Atl. 585, 588, 589 (1936).

The appellants know of no necessity justifying the discrimination created by the mandatory party lever. The reason put forth by the District Court that the party lever "simplifies and speeds up the voting process for a large number of voters" may justify the availability of a party lever, but it certainly is no justification for making that use mandatory. Many voters are unsophisticated and untutored in the ways of machines and when a legislature decides to supplant the simple and easily understood paper ballot with a machine it must not impose requirements that may frighten or deter those forced to use the machine from voting their conscience. The right to a free and unpressured vote is protected for the entire spectrum of voters, and is as guaranteed to the infirm, timid and unmechanical as it is to those atune to the speed and complexity of the machine age. *Callaghan v. Voorhis, supra; In re Engle,* 8 Fed. Cas. 716, 718 No. 4488 (C.C. Md. 1877).

II. Conclusion.

The appellants respectfully submit that the question of whether or not the mandatory party lever violates the United States Constitution presents a substantial federal question to this court and respectfully prays that this court take jurisdiction of this case.

Respectfully submitted,

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